



**Date:** May 23, 2023

**To:** Mayor and Members of City Council  
**Through:** Kimberly Rehberg, City Attorney  
**From:** Anne Marie Tosco, Assistant City Attorney  
**Subject:** Presentation and Ordinance to Establish Standards for Trespass from City Property

### **Executive Summary**

In order to preserve due process protections for the public and guard the City against liability, the City Attorney's Office has formalized the City's trespass procedures in a new City Code Ordinance Chapter 46, Section VIII, which is proposed for adoption into the City Code. The proposed ordinance establishes standards setting forth the conduct that is subject to trespass from City property, as well as uniform procedures for trespassing individuals from City property, including notice to the individual and an opportunity to appeal the trespass.

### **Motion**

To receive a presentation on the proposed ordinance establishing standards for trespass from City property; and

To adopt an ordinance amending Chapter 46 of the City Code to establish standards for trespass from City property.

### **Background**

Like many municipalities, the City of Durham has sometimes found itself in the position of having to remove individuals from City property because of disruptive or harassing conduct and prohibit these individuals from returning. The City Attorney's Office has been engaged on a number of such trespass issues, including a lawsuit and requests for removal of individuals. Though some individual departments have policies in place to trespass individuals from City property, there are no formal City-wide standards setting forth procedures for doing so. This is a deficiency, given individuals have a constitutionally-protected liberty interest to be on City lands that are generally open to the public. Individuals may forfeit this liberty interest by trespass, but without guidelines establishing standards for trespass for both the public and the City, the City risks arbitrarily depriving individuals of this liberty interest. Further, the law requires that individuals receive due process, specifically notice and an opportunity to be heard, prior to deprivation of a liberty interest.

In order to allow the City to lawfully address trespass issues, the City Attorney's Office has prepared an ordinance setting forth (1) the conduct that is subject to trespass from City property, and (2) uniform procedures for trespassing individuals from City property, including notice to the individual and an opportunity to appeal the trespass.

### **Issues and Analysis**

#### **A. What conduct would be subject to trespass from City property?**

In order to protect public safety and prevent the disruption of public business, under the proposed ordinance, a person may be subject to trespass from City property for conduct that is “dangerous,” “unlawful,” or “unreasonably disruptive.” These terms are defined in the ordinance. “Dangerous” conduct is that which creates an imminent and unreasonable risk of injury or harm to persons or property. “Unlawful” conduct is that which is prohibited by federal, state, or local law. Finally, “unreasonably disruptive” conduct is that which unreasonably interferes with the conduct of City business or others’ use and enjoyment of City property, or that which is unreasonably inconsistent with the normal use of City property.

**B. Who is authorized to trespass individuals from City property?**

The ordinance authorizes the City Manager to issue Notices of Trespass to individuals who engage in the conduct proscribed by the ordinance. The City Manager is further authorized to delegate this authority, in writing, to other City officers or employees as the Manager deems appropriate given their general area of responsibility within the City.

**C. What are the proposed procedures for trespass from City property?**

The City Manager, or their designee, may issue a written Notice of Trespass to individuals who engage in dangerous, unlawful, or unreasonably disruptive conduct, though employees who observe this conduct are encouraged to first request the individual cease the conduct or leave City property voluntarily. Notices of Trespass must describe the reason for the trespass, the area(s) from which the individual is trespassed, the duration of the trespass based upon the specific conduct, the consequences of re-entry, and the individual’s right to appeal the trespass. Specifically, individuals who are trespassed from areas of City property may appeal the trespass to the City Manager by submitting a statement detailing the basis for their appeal and any evidence in support of their appeal to the City Clerk. A review hearing will then be held, where the City has the burden of proving by a preponderance of the evidence that the individual violated the ordinance in order for the Manager to uphold the trespass. The City Manager is authorized to rescind or modify a Notice of Trespass where an individual demonstrates the conduct was intended to be expressive conduct protected by the First Amendment or where the City Manager deems the circumstances warrant a modification or rescission. The Manager’s decision is final, and will be communicated to the individual in writing. The ordinance sets out time limits for making the appeal, scheduling the review hearing, and communicating the Manager’s written decision.

**D. What are the consequences of trespass from City property?**

A person who re-enters City property after being issued a Notice of Trespass from that property may be arrested and/or charged with criminal trespass, have the duration of the Notice of Trespass extended by the Manager, and/or be subject to a civil injunction from a court banning them from public property for a specific period of time.

**E. What about the First Amendment?**

Trespass from City property under the proposed ordinance is justified only for content-neutral, conduct-based reasons that further the City’s significant interest in preventing the disruption of public business and protecting public safety. As described above, the Manager shall rescind Notices of Trespass where the trespassed individual demonstrates that the conduct that was the basis for the trespass was intended to be expressive conduct protected by the First Amendment. Further, the City Manager or the Manager’s designee shall consider and authorize individuals who have been trespassed pursuant to this ordinance to enter City property to exercise their First Amendment rights or conduct necessary City business if there is no reasonable alternative location or means to exercise such rights or conduct such business,

thereby leaving open alternative channels of communication. The Manager is authorized to restrict the entry of these individuals as necessary to preserve safety and limit disruption.

**Alternatives**

The City could elect to not adopt the ordinance establishing standards for trespass from City property, in which case any trespass issues would continue to be addressed on a provisional basis. This alternative is not recommended.

**Financial Impact**

None.

**Equal Business Opportunity Summary**

This item relates to adoption of an ordinance to establish standards for trespass from City property in order to ensure compliance with constitutional law. It neither needs nor requires review by the Finance Department for compliance with the Ordinance to Promote Equal Business Opportunities in City Contracting.

**Contractor Workforce Diversity & Hiring Practices**

Due to the nature of this agenda item, obtaining Contractor Workforce Diversity & Hiring Practices information is not applicable.

**Attachments**

Attachment 1: Presentation on a Proposed Ordinance Establishing Standards for Trespass from City Property

Attachment 2: Proposed Ordinance Establishing Standards for Trespass from City Property